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IN THE

Supreme Court of the United States

October Term, 1964
No. 986

AARON ROSENZWEIG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on November 4, 1964.

Citations to Opinion Below.

The Court of Appeals for the Ninth Circuit affirmed the judgment entered in the United States District Court, Southern District of California, without opinion. The memorandum opinion of the District Court is printed in Appendix B hereto, *infra,* pages 10-16. The findings of fact and conclusions of law of the District Court are printed in Appendix B, *infra,* pages 17-23.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 4, 1964. A rehearing was denied by said Court of Appeals on December 17, 1964. The jurisdiction of this Court is invoked under 28 United States Code, Section 1254(1).

Questions Presented.

1. Is there substantial, or any, evidence to support a finding that the criminal acts of petitioner's alleged co-partners were committed in the ordinary course of business of the partnership?
2. Are criminal acts of co-partners within the ordinary course of business of a partnership?
3. Is petitioner civilly liable for the criminal acts of his alleged co-partners?

Statutes and Regulations Involved.

The statutory provisions involved are both federal and California statutes. The relevant federal statute is the Emergency Price Control Act, Public Law 421, 56 Stat. 23 *et seq.*, 50 U.S.C. App. 901 *et seq.*, as amended. Regulations under the Price Control Act include regulations of the Defense Supplies Corporation and the Office of Economic Stabilization at 8 Fed. Reg. 10826, 10 Fed. Reg. 4241, 10 Fed. Reg. 4494, 12 Fed. Reg. 2408, and the regulations of successor agencies.

The California statutes are found in the California Corporations Code and are identical to the provisions of the Uniform Partnership Act: Sections 15009, 15013, and 15015 of the California Corporations Code (Sections 9, 13, and 15 of the Uniform Partnership Act).

The pertinent provisions of the above statutes and regulations are printed in Appendix A, *infra*, pages 1-9.

Statement.

Background of the Case.

The statement of facts contained in the opinion of the United States Emergency Court of Appeals (*Rosenzweig v. General Services Administration*, 292 F. 2d 22, cert. den. 369 U.S. 818 (1962), which involved an earlier, although related, proceeding, contains a summary of the pertinent background facts and is hereby adopted. Such statement reads as follows:

> During 1944 Charles M. King, Hyman Stillman and Lou Segal entered into a partnership arrangement known as Southern California Meat Company No. 2. Allied in this enterprise was Southern California Meat Co., Inc., a corporation principally owned by King. Southern California Meat Co., Inc. was to slaughter cattle and Southern California Meat Company No. 2 was to sell the meat. It appears that Southern California Meat Company No. 2 charged overceiling prices on the sale of meat and due to difficulties in obtaining subsidy payments the use of Southern California Meat Company No. 2 was abandoned.
>
> In place of the previous partnership arrangement, Southern California Meat Co., Inc., King, Stillman and Segal late in 1944 entered into a similar arrangement under the name of Central Packing Company. The name, Central Packing Company, was that of an existing business owned by the complainant, which had a slaughtering license. The Central Packing Company had a clean meat purchasing and selling record on the basis of which Stillman, Segal, King and King's corpora-

tion, Southern California Meat Co., Inc., could claim and receive subsidy payments. During February and March, 1945, Central Packing Company filed applications with Defense Supplies Corporation pursuant to Revised Regulation No. 3, for cattle slaughter subsidy payments in the aggregate sum of $143,303.40. These subsidy claims, signed by the complainant as "Owner", and paid by Defense Supplies Corporation to Central Packing Company, are the subject of this controversy.

During February 1946, Southern California Meat Co., Inc., King, Stillman and Segal were indicted in the United States District Court for the Southern District of California, Central Division, No. 18,-366, for violations of and conspiracy to commit violations of the Emergency Price Control Act of 1942 and the applicable regulations promulgated thereunder. It was charged that these defendants operated under the firm names of Southern California Meat Co., Inc., Southern California Meat Company No. 2, and Central Packing Company, and they shared in all gains and profits accruing from the illegal activities described in the indictment. Among the overt acts were those charging the defendants with the issuance, during February and March, 1945, of certain invoices of Central Packing Company showing that meat had been sold at over-ceiling prices. On July 5, 1946 all four defendants were found guilty and judgments were entered against them. The complainant, while admittedly associated in the business of Central Packing Company, was never indicted or found guilty of any connection with such activities.

On December 23, 1947 a letter-order was sent by Reconstruction Finance Corporation, the agency then in charge of such matters, addressed to Central Packing Company, in care of the complainant, stating that, as the result of an investigation, its subsidy claims were being declared invalid for the periods August 1944 through April 1945. Accordingly, demand was made for reimbursement of the sum of $196,962.62, plus interest. Under dates of January 7 and 9, 1948, the complainant requested information with respect to the basis on which these claims were declared invalid. The parties treated the letter of January 9, 1948 as a formal protest against the letter-order of December 23, 1947. Under date of January 16, 1948 the complainant was advised that the case had been referred to the U. S. Department of Justice and was being handled by the Legal Division of Reconstruction Finance Corporation.

No further action was taken until May 1958 when the United States filed a civil action, No. 423-58-BH, in the United States District Court for the Southern District of California, Central Division, against King, Stillman, Segal and the complainant doing business as Central Packing Company, and Southern California Meat Co., Inc., for the recovery of the subsidy payments in question. Default judgments were entered against defendants Stillman and Segal. The action against King and Southern California Meat Co., Inc., was dismissed. The action against the complainant was dismissed without prejudice on the ground that a protest against the letter-order of December 23, 1947 was

still pending. Under date of June 27, 1960 the complainant wrote General Services Administration, the Administrator of which was the successor to Reconstruction Finance Corporation, seeking a determination of the pending protest and attacking the validity of the order on the ground that the complainant had not violated any applicable statutes or regulations.

Under date of August 4, 1960 the respondent informed the complainant that the claims of Central Packing Company for the period from August 1944 through January 1945 in the amount of $53,659.22 were being reinstated but that the February and March 1945 claims remained invalid because of the wilful violations of the Office of Price Administration regulations by Central Packing Company during those two months, which violations were confirmed by the criminal judgments entered against Segal and Stillman. The letter further stated that inasmuch as the Government had not been successful in its efforts to obtain restitution from Segal and Stillman of the meat sudsidy payments made to Central Packing Company, and, since the complainant was a partner in Central Packing Company, demand was being made on complainant for restitution of the sum of $143,303.40, plus interest. This letter was treated by the respondent as a new order invalidating the claims and seeking recapture of the money paid to Central Packing Company, which superseded the letter-order of December 23, 1947. On August 15, 1960 the complainant protested the letter-order of August 4, 1960 pointing out that neither he nor Central Packing Company had been

indicted or convicted in the criminal proceeding referred to and that there never was any determination, judicial or administrative, that Central Packing Company or the complainant himself was in wilful violation of the regulations. Correspondence subsequently passed between the complainant and the respondent in which each expressed his views in respect to the liability of Central Packing Company and the complainant for restitution of the subsidy payments in question. The complainant's protest was denied on December 7, 1960 and the validity of the letter-order of August 4, 1960 is here for review.

The Emergency Court of Appeals affirmed the decision of the General Services Administration and dismissed petitioner's complaint. (The decision of the Emergency Court of Appeals is contained in Appendix B, *infra*, p. 26.) The Supreme Court denied certiorari.

The Emergency Court of Appeals, in its opinion dated December 6, 1961, made the following findings of fact and rulings:

1. That the administrative agency had authority to declare subsidy claims invalid based upon wilful violations of price regulations;
2. That this determination could only be made if the subsidy applicant had been convicted in a criminal proceeding involving subsidy payments for the periods in question;
3. That the administrative determination was correct since Stillman, Segal, and King, the individual partners of the applicant Central Packing Company had been convicted of violations of

price-regulations and that this was considered to be a conviction of the partnership, Central Packing Company;

4. That therefore, the subsidy applicant, Central Packing Company was in wilful violation of OPA regulations, and therefore the subsidy claims were invalid.
5. That as a consequence the Government was entitled to restitution of subsidy payments made from the partnership, Central Packing Company [R. I, 266-267].

It is to be noted that the opinion of the Emergency Court of Appeals goes on to state the following:

> "The complainant (Rosensweig) contends, however, that he is wholly innocent of the illegal activities of the other partners of Central Packing Company, that he did not receive any part of the subsidies in question, that as to these transactions he was not a partner, and that the respondent is seeking to hold him liable for criminal acts of others. It may well be that these contentions of complainant are well founded. We intimate no opinion upon their merits, however, since this court is without power to adjudicate these questions."

The Case at Bar.

Upon the denial of petitioner's complaint in the United States Emergency Court of Appeals, and the subsequent denial of the petition for a writ of certiorari by this Court, the respondent brought the instant action in the United States District Court, Southern District of California, seeking restitution from petitioner of the subsidy moneys. The jurisdiction of the United States Dis-

trict Court was invoked under Title 28, United States Code, Section 1345.

After various preliminary motions [R. I, 93-125, 126-137, 151, 159-177, 182-186, 187-188, 196-203], the District Court granted an Order for Trial on a Limited Issue [R. I, 203-214]. Said Order and a subsequent Pre-Trial Conference Order [R. I, 239-245] contained partial findings of facts, partial conclusions of law and a statement of limited issues to be tried. The conclusions of law include a statement that the ruling of the Emergency Court of Appeals is *res judicata* on the parties. With respect to the limited issues to be tried, they were as follows [R. I, 210, 243-244]:

1. Whether petitioner was a partner in the partnership of Central Packing Company during the months of February and March, 1945 (an issue of fact);
2. Whether petitioner, if a partner, is civilly liable for the criminal actions of his co-partners (an issue of law);
3. Whether the criminal acts of Stillman and Segal as found by the court in criminal action 18366, United States District Court, Southern District of California, wherein Southern California Meat Co., Inc. King, Stillman and Segal were defendants, were committed in the ordinary course of business, if that fact was not determined by a court in previous litigation between the Government and said Stillman and Segal involving their activities concerning subsidy claims of Central Packing Company and recovery of subsidy payments to said Central Packing Company or Stillman or Segal (an issue of fact).

No evidence was adduced at the trial with respect to the aforesaid issue number three, to wit, whether the criminal acts were committed in the ordinary course of the business of the partnership. The only evidence even faintly relating to this issue is the testimony of Segal that both he, Segal, and Stillman sold beef, on many occasions, in behalf of Central Packing Company. Also respondent relies on the Criminal Action No. 18366 in which it was alleged in the indictment, and found to be true by the conviction, that Southern California Meat Company, Inc., King, Stillman and Segal made false entries and sold meat at over-ceiling prices while engaged in the business of slaughtering cattle and selling meat under the firm names of Southern California Meat Company No. 2 and Central Packing Company. There is, however, no finding in said criminal proceeding that said acts were in the ordinary course of business. The District Court below found that the criminal acts were committed in the ordinary course of the business of the partnership [R. I. 269].

Evidence was adduced at the trial principally and solely on the aforesaid issue (of fact) number one, namely, whether or not petitioner was a partner in the partnership, Central Packing Company. The District Court found that petitioner was a partner.

Reasons for Granting the Writ.

1. The decision of the District Court, affirmed without opinion by the Court of Appeals appears to be in conflict with a decision of the Court of Appeals for the Fifth Circuit, *Prairie Oil & Gas v. Shanblum,* 294 Fed. 894 (1923), and with the prevailing law throughout the country.

In *Crane on Partnership*, a standard text, it is stated as follows, on pages 291 and 292:

> "Acts so far contrary to public policy as to be subject to statutory penalties are generally to be considered as outside the scope of business, so that a non-participating partner is not liable. The innocent partner has been held not liable to an action of trover for the security furnished on a usurious loan. The non-participating partners are not liable for the statutory penalty recoverable for unlicensed use of a copyrighted picture. The penal liability imposed by statute for wilfully cutting timber on another's land cannot be recovered from an innocent partner. . . ."

In *Prairie Oil & Gas v. Shamblum,* 294 Fed. 894 (1923), a partnership was formed for the business of buying and selling second-hand usable oil-well supplies, and cutting and threading oil pipe. While the partnership was in existence, two of the partners, without the knowledge, consent or acquiescence of the non-participating partners bought and disposed of a lot of used oil casings which had been previously stolen from the plaintiff, and which the participating partners knew had

been stolen. The plaintiff brought a suit to recover the value of the casings stolen from the non-participating partners. On appeal, a judgment for defendants was affirmed, the court stating as follows:

> ". . . The theory on which rulings of the court are complained of is that, the partnership having been formed for purposes including the buying and selling of used or second-hand casing, the above described buying and disposition of plaintiff's casing had the effect of making the defendants liable, though the defendants never contemplated any partnership dealing of property known to be stolen, and such acquisition and disposition of the plaintiff's casing was not in the ordinary course of business, for the carrying on of which the partnership was created and existed. That theory is untenable. A necessary foundation for the liability of partners for the tortious act of a co-partner is that the act shall be done in the line or reasonable scope of the co-partnership business; a partner not being liable for an injury resulting from an unauthorized and unratified wilful or negligent act of a copartner committed outside of the agency or common business . . ."
>
> "The fact that the acquisition of or dealing in property known to be stolen was wholly foreign to and beyond the scope of the agency created by the defendants by their entering into the partnership, and participating in the partnership business agreed to be carried on, was enough to keep them from being liable for the acts in question. . . ."

The ruling in the *Prairie Oil & Gas Company* case is applicable here. In that case, the partnership was formed for the purpose of selling and buying secondhand usable oil well equipment. In the case at bar, the alleged partnership was formed for the purpose of buying and slaughtering cattle, and selling meat. In the *Prairie Oil & Gas Company* case, the guilty partners dealt in and disposed of stolen used oil well equipment, which they knew was stolen. In the case at bar, the guilty partners sold the beef illegally at over-ceiling prices. In each case, the guilty partners were doing acts *ostensibly* within the scope of the partnership business, but the court in the *Prairie Oil & Gas Company* case held that criminal acts were not within the ordinary scope of the partnership business.

Many cases in this country support this view: *Graham v. Meyer,* Fed. Cas. No. 5673 (1858) (innocent partner not liable for usury); *Schreiber v. Sharpless,* 6 Fed. 175 (1881) (innocent partner not liable for copyright infringement); *Marks v. Hastings,* 101 Ala. 165, 13 So. 297 (1893) (innocent partner not liable for malicious prosecution); *Martin v. Simpkins,* 116 Ga. 254, 42 S. E. 483 (1902) (innocent partner not liable for false imprisonment); *Hutchins v. Turner,* 172 Ore. 434, 138 P. 2d 613 (conversion of funds); *Dulchersky v. Solomon,* 136 Wash. 645, 241 Pac. 19 (1925) (assault); *Williams v. Hendricks,* 115 Ala. 227, 22 So. 439 (1897) (penalty for violation of statute prohibiting cutting of trees on another's land); *Watson v. Hinchman,* 42

Mich. 27, 3 N. W. 236 (1879) (statutory penalty for fraudulent debtors; *McDonald v. Hearst,* 95 Fed. 656 (1889); *Taylor v. Gilman,* 24 Fed. 632 (1885) (statutory penalties for copyright infringement).

2. There is no evidence, substantial or otherwise, to support the finding of the District Court that "the criminal acts of Stillman and Segal . . . were commited in the ordinary course of business of Central Packing Company."

The only evidence referred to in respondent's brief in the Court of Appeals as purportedly supporting said finding appears on pages 23 and 24 thereof. On page 23 there is a reference to the criminal action No. 18366, in which the alleged partners of appellant were convicted of selling meat at overceiling prices. It is alleged in the indictment in said criminal action, and found to be true by the conviction, that Southern California Meat Company Inc., King, Stillman and Segal made false entries and sold meat at over-ceiling prices, while engaged in the business of slaughtering cattle and selling meat under the firm names of Southern California Meat Company, Inc., Southern California Meat Company No. 2, and Central Packing Company. There is no finding in said criminal proceeding that said acts were in the ordinary course of business. The mere identification of the criminal defendants as committing the crimes while engaged in business under certain firm names does not render the crimes acts within the ordinary course of business.

On page 24 of respondent's brief, the testimony of Segal is referred to the effect that both Stillman and Segal sold beef, on many occasions, in behalf of Central Packing Company. This is the second instance relied upon by the appellee to support said finding. The mere sale of beef, while in the ordinary course of business, however, is not evidence that the crime of selling beef at over-ceiling prices is one within the ordinary course of business.

Thus, respondent has failed in its brief to point out any evidence which supports the finding that the criminal acts were committed in the ordinary course of the business of the partnership. It is respectfully submitted that no such evidence exists. Therefore, there being no evidence whatever to support said finding, such finding is clearly erroneous.

3. The questions presented are of importance in the field of partnership law. The decisions below are contrary to the spirit of the decisions of this Court in *United States v. A. & P. Trucking Co.*, 358 U.S. 121 and *Gordon v. United States,* 347 U.S. 909. The *Gordon* case held that innocent partners are not liable for the criminal acts of their co-partners. In the *A. & P. Trucking Co.* case this Court noted that if a partnership entity was guilty of a crime, non-participating partners are not responsible for fines, penalties and other punishment. By finding petitioner herein civilly liable to respondent as a result of criminal convictions of his alleged co-partners, he is being held responsible for what is, in effect, a penalty.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH HENRY WOLF and
PAUL WYLER,
Counsel for Petitioner.

Dated: March 10, 1965.

APPENDIX A.

Pertinent Federal Statutes.

The Emergency Price Control Act of 1942 (Public Law 421, 56 Stat. 23 *et seq.*, 50 U.S.C. App. Sec. 901 *et seq.)*

Section 2(a) 50 U.S.C. App. Sec. 902(a): Whenever in the judgment of the price administrator . . . the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act . . .

Section 2(e) 50 U.S.C. App., Sec. 902(e): Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States . . . make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof . . .

Section 203(a), 50 U.S.C. App., Sec. 923(a): Within a period of sixty days after the issuance of any regulation or order under Section 2 . . . any person subject to any provisions of such regulation, order . . . may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections . . .

Within a reasonable time after the filing of any protest under this sub-section, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order . . . in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith . . .

Section 204(a), 50 U.S.C. App., Sec. 924(a): Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c) of this section, specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be con-

sidered by the court, unless such objection shall have been set forth by the complainant in the protest of such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

Section 204(b), 50 U.S.C. App. Sec. 924(b): No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) of this section within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until

other final disposition of the case by the Supreme Court.

Section 204(d), 50 U.S.C. App. Sec. 924(d): Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a court of appeals as provided in section 240 of the Judicial Code, as amended. The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Section 205(e), 50 U.S.C. App., Sec. 925(e): If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for

use or consumption other than in the course of trade or business may bring an action either for $50.00 or for treble the amount by which the consideration exceeded the maximum price whichever is greater, plus reasonable attorneys fees and costs as determined by the Court . . .

Pertinent Federal Regulations.

Regulation 3 of the Defense Supplies Sec. 7003 Corporation, 8 Fed. Reg. 10826, 32 C. F. R., 1943 Supp., effective as of June 7, 1943:

7003.1 Definitions . . .

a) "Person" means an individual, corporation, partnership, association, institution, or other business entity, or legal successor, or representatives of any of the foregoing.

* * *

k) "Applicant" means any person who files a claim for payment under this Regulation.

* * *

7003.5 Payment of Claims

* * *

d) *Terms of payment*

. . . On a finding that a claim is invalid or defective, Defense Supplies Corporation shall have the right to require restitution of any payment or part thereof . . .

* * *

Section 7003.10 Right to Declare Claims Invalid

a) *Compliance with other Regulations*

Defense Supplies Corporation shall have the right to declare invalid, in whole or in part, any claim which

does not meet the requirements of this Regulation, and any claim filed by any applicant who, in the judgment of the War Foods Administrator or the Price Administrator has wilfully violated any regulation of their respective agencies applicable to livestock slaughter or the sale or distribution of meat.

Revised Regulation 3 of the Defense Supplies Corporation, (superseding the original Regulation 3), *10 Fed. Reg. 4241, 32 C. F. R. 1945 Supp., Sec. 7003, effective as of January 19, 1945:* Identical to the quoted portions of the original Regulation 3, except as follows:

Section 7003.10 Right to Declare Claims Invalid.

a) *Compliance with other Regulations*

Defense Supplies Corporation shall have the right to declare invalid, in whole or in part, any claim which does not meet the requirements of this Regulation, and any claim filed by an applicant who, in the opinion of the War Foods Administrator or the Price Administrator has wilfully violated any regulation of their respective agencies applicable to the purchase or sale of livestock or to livestock slaughter or to the sale or distribution of meat.

Directive 41 of the Office of Economic Stabilization (superseding Regulation 3 and Revised Regulation 3 of the Defense Supplies Corporation), *10 Fed. Reg. 4494. 32 C. F. R., 1945 supp. Sec. 4004, effective April 24, 1945:*

Section 7(b)(1): Defense Supplies Corporation is directed to continue its present procedure of declaring invalid, in whole or in part, any claim for subsidy

payment filed by an applicant who, in the judgment of the Price Administrator, has wilfully violated any meat or livestock regulation or order issued by the Price Administrator. Such a judgment shall be made only in the event the alleged violation is referred to the United States attorney for prosecution.

Amendment 11 to Directive 41 of the Office of Economic Stabilization, 12 Fed. Reg. 2408, 32 C. F. R. 1947 Supp. Sec. 4004, effective April 8, 1947:

Sectino 4004.1 Livestock Slaughter payments (Directive 41) is amended by the addition of the following paragraphs to Section 7(b)(1):

As used in this Section 7(b)(1) the phrase "its present procedure" was intended to and does refer to the procedure by which subsidy funds are withheld from subsidy applicants involved in criminal proceedings. The procedure was and is as follows:

Withholding of subsidy funds from a subsidy applicant involved in criminal proceedings is initially recommended to the Reconstruction Finance Corporation by the Price Administrator only when all three of these factors are present:

(1) The Price Administrator (or his duly authorized representative) has investigated the alleged wilful violation and referred the case to the United States Attorney for the institution of criminal proceedings,

(2) The Grand Jury has returned an indictment or the United States Attorney has filed an information against the subsidy applicant for the alleged wilful violations of any meat or livestock regulation or order issued by the Price Administrator, and

(3) A responsible member of the applicant's management was chargeable with knowledge of the facts alleged to constitute the wilful violation. . . .

After receiving the Price Administrator's recommendation, the Reconstruction Finance Corporation then notifies the applicant as to the specific amount of subsidy funds that are thus to be withheld or recaptured, in the event the subsidy applicant has received the funds . . .

The Reconstruction Finance Corporation is directed to amend its Livestock Slaughter Regulation Number 3 to make it clear that in any instance in which a subsidy applicant may have subsidy funds withheld after termination of the criminal proceedings contrary to the procedure for such withholding described in this Amendment, the applicant may apply for and obtain release of such subsidy funds . . .

Pertinent California Statutes.

Section 15009, California Corporations Code (Section 9, Uniform Partnership Act) provides, in pertinent part, as follows:

> "(1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner . . . for apparently carrying on in the usual way the business of the partnership binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.
>
> "(2) An act of a partner which is not apparently for carrying on of the business, of the partner-

ship in the usual way does not bind the partnership unless authorized by the other partners.

"(3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to: . . .

"(c) do any other act which would make it impossible to carry on the ordinary business of a partnership."

Section 15013, California Corporations Code (Uniform Partnership Act, Section 13), provides as follows:

"Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act."

Section 15015 of the California Corporations Code (Section 15 of the Uniform Partnership Act) provides, as follows:

"All partners are liable

"(a) jointly and severally for everything chargeable to the partnership under Section 15013 and 15014

"(b) Jointly for all other debts and obligations of the partnership. . . ."

APPENDIX B.

Memorandum Opinion for Use in Preparing Findings of Fact, Conclusions of Law, and Judgment.

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, vs. Aaron Rosenzweig, also known as Aaron Rosensweig, doing business as Central Packing Company, Defendant. No. 62-1337-EC.

Filed Jan. 21, 1964.

The within action is for restitution of alleged invalid subsidy claims paid by the Reconstruction Finance Corporation to Central Packing Company pursuant to Section 2(e) of the Emergency Price Control Act of 1942, as amended, by previous order of this court made in the case on June 20, 1963. The trial herein was limited to the following questions of fact and law:

1. Was the defendant during the months of February and March, 1945, a partner in the partnership, Central Packing Company?
2. If a partner, was defendant civilly liable for the criminal acts of his co-partners in connection with the obtaining money under the above mentioned invalid subsidy claims?
3. Whether the criminal acts of Stillman and Segal, as found by the court in Criminal Action No. 18366, United States District Court, Southern District of California, wherein Southern California Meat Company, Inc., King, Stillman and Segal were defendants, were committed in the ordinary course of business of Central Packing Company. Defendants Stillman and Segal were found guilty in that action.

The Emergency Court of Appeals affirmed a letter of August 4, 1960, wherein the General Services Administration, the successor agency to the Reconstruction Finance Corporation, informed defendant that certain Central Packing Company subsidy claims were being reinstated but that the claims for February and March, 1945, remained invalid. Defendant's protest of the letter order of August 4th was denied. See *Rosenzweig vs. General Services Administration,* 299 F. 2d 22, Dec. 6, 1961; Certiorari denied, 369 U.S. 818.

Without further detailing all of the litigation and communications which arose from the invalid claims for refund for February and March, 1945, suffice it to say that from the evidence adduced at the trial the court concludes that the defendant, Aaron Rosensweig, during the months of January, February and March, 1945, was a partner in the partnership of Central Packing Company engaged in the business of custom slaughtering and wholesaling of meat, that the defendant not only participated in financing the venture but signed all of the five claims for subsidy payments submitted to RFC during the period of the partnership, to wit, approximately January 1 to May 31, 1945, that he did all of the buying of cattle for the operation and to insure protection of his investment he co-signed all of the checks issued by the partnership, which consisted of Messrs. Stillman, Segal and the defendant. Defendant also signed letter dated March 9, 1945, to Defense Supplies Corp., Pltf.'s Ex. 7, and "Petition for Relief From Hardship" to the Office of Price Administration, Pltf.'s Ex. 9, dated November 22, 1946, and Affidavit of Aaron Rosensweig dated August 20, 1945, Pltf's Ex. 11. Defendant testified that he could not read well but it is

not entirely clear from the evidence whether the above mentioned documents were read to him before signing same. It is noted that on page 3 of the Affidavit defendant states:

> "In connection with the partnership arrangement I invested $25,000 and Segal and Stillman each invested approximately the same amount. We were each to receive one-third of the net profits. I did not receive any salary from Central Packing Company or from this partnership arrangement, merely receiving on drawing account $100 a week, which was charged to my personal account. * * *
>
> "The chief reason for my being brought into the partnership with Segal and Stillman was, to my knowledge, the fact that I possessed a license to slaughter."

It is also noted that the Affidavit states the affian. has read same and to the best of his knowledge and belief the statements therein are true.

The court can only conclude that the obtaining of the subsidies in the circumstances was in the furtherance of partnership business. It is true that many years have passed since the transpiring of the events in issue but many years ago the defendant had reason to believe he would be implicated as a partner for receipt by the partnership of alleged "bonuses" over and above the selling price of meat sold by the partnership. (See page 2 of Affidavit, Pltf.'s Ex. 11.) These facts, as well as further developments, should have alerted de-

fendant to taking every possible step in the way of marshaling his defenses.

Defendant urges that he knew nothing of the black market sales of meat by the partnership, as has been determined in prior proceedings referred to hereinabove, and that he had no control over the partnership business and at the time of trial stated that there was in fact no partnership, taking the position that he was merely an employee. As stated above, the court after consideration of all of the evidence does not so conclude.

It is noted that there was not a formal partnership agreement but even though the relationship be deemed a joint venture the result would appear to be the same. *Cunningham vs. De Mordaigle,* 82 Cal. App. 2d 620 at 621; *Grant vs. Weatherholt,* 123 Cal. App. 2d 34 at 45-47.

Now the question of whether a partner is civilly liable for the criminal acts of a co-partner. The law seems clear that where a partner, acting within the scope of the business and in furtherance of its agreed purposes, is guilty of fraud in procuring benefits retained by the partnership, all partners are liable for the fraud by way of compensatory damages. In the case of *B. F. Goodrich Co. vs. Naples,* 121 F. Supp. 345, plaintiff sought recovery from defendant and others for secret profits and kickbacks. Defendant Naples had been working for plaintiff and obtained kickbacks and unauthorized profits from third persons who were dealing with

plaintiff in its course of business. Defendant Naples was a member of the defendant partnership which received the unauthorized profits and the question arose as to the liability of partners who had no knowledge of the transactions. At page 353 of his opinion Judge Yankwich states:

> "The surviving partner, who liquidated the partnership, denies knowledge of the transaction. But this does not relieve him of liability. Under California law, every partner is an agent of the partnership, for the purpose of its business, and the act of every partner for apparently carrying on the business of the partnership, including his wrongful acts, such as fraud and deceit, bind the partnership." Citing California Corporations Code Sections 15009(1), 15013.

See also *Gibson vs. Henley,* 131 Cal. page 6, which involved an action for fraud against one of the two partners of a law firm who was wholly innocent of a fraudulent embezzlement by his co-partner of funds of plaintiff. The court held that no action grounded upon the fraud lay against the said defendant partner but observed that he was liable in an action against the partnership grounded upon the firm's obligation for money had and received, and damages, if any, caused by the fraud of the co-partner which cause of action in that particular case was barred by the statute of limitations.

At page 7 of its opinion the court states:

> "* * * it is very clear that there is no cause of action for fraud against the defendant Henley. The complaint shows a fraud committed by his partner McSherry, but it is not pretended that Henley was

> in any way connected with it, otherwise than by the existence of the partnership relation. By force of this relation he became responsible for the money received by McSherry, and also for the damages caused by the fraud, if any; but he did not become guilty of the fraud, nor could he be sued directly for it."

This being the rule, and although a partner is not criminally liable for the crime of another, it does not appear to the court that the fact the fraud in question constitutes a crime absolves the other partners from liability of the partnership Central Packing Company for the wilful violation of the OPA regulations. All partners are liable for the debts of the partnership, including debts arising from fraud. Rules of liability as between partners and joint venturers may appear inequitable on their face, but if the public is to be protected a partner may not avoid liability for the fraud of another partner.

In the circumstances in the case at bar, though he may not have been conversant with all of the activities of the managing partner, the defendant herein could have acquainted himself with all of the aspects of the business had he so desired. The duties of operation of the business were divided among the partners. Stillman was the bookkeeper and office manager, Segal worked in the cooler, moving the meat in and out of storage, and defendant was the buyer of cattle. He was in the office frequently and signed all checks issued by Central Packing Company. If, as he says, he knew of no frauds in which the Company was engaging, his liability is unfortunate but one he could have avoided by vigi-

lance and one which, in the judgment of this court, the law imposes.

Plaintiff will take Judgment as prayed and counsel for plaintiff is requested to prepare, serve and lodge proposed Findings of Fact, Conclusions of Law, and Judgment, in accordance with Local Rule 7, as amended. The Judgment shall be a separate document.

This Memorandum Opinion is not to be deemed a final Judgment.

Dated: January 21, 1964.

E. Avery Crary
United States District Judge.

Findings of Facts and Conclusions of Law.

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, v. Aaron Rosenzweig also known as Aaron Rosensweig, doing business as Central Packing Company, Defendant. Civil No. 62-1337-EAC.

This case came on for trial on the 14th day of January, 1964, before the Honorable E. Avery Crary, Judge presiding. The plaintiff appeared by its attorneys, Francis C. Whelan, United States Attorney, Donald A. Fareed, Assistant U.S. Attorney, Chief, Civil Section, and Stan M. Lintz, Assistant U.S. Attorney, and the defendant appeared by its attorneys Joseph Henry Wolfe and Paul Wyler; and evidence both oral and documentary having been taken, and the Court having fully considered the same and being fully advised in the premises, make the following:

FINDINGS OF FACT

I

The within action is a civil action for restitution of invalid subsidy claims paid by the Reconstruction Finance Corporation to the Central Packing Company pursuant to Section 2(e) of the Emergency Price Control Act of 1942, as amended, 50 U.S.C. § 902(e).

II

Federal jurisdiction is invoked pursuant to Section 1345 of Title 28 United States Code.

III

During 1944, one Charles M. King owner of Southern California Meat Co., Inc., Hyman Stillman, and Lou

Segal entered into a partnership arrangement under the name of Southern California Meat Company #2 to engage in the business of slaughtering cattle and selling meat at over ceiling prices while at the same time attempting to obtain subsidy payments from the government.

IV

Due to difficulties in obtaining subsidy payments, the use of Southern California Meat Company #2 was abandoned; and in place of the previous arrangements, Southern California Meat Co., Inc., King, Stillman, and Segal entered into a similar arrangement under the name of Central Packing Company.

V

Central Packing Company was a business owned by defendant in 1944 which had a slaughtering license and a clean meat-purchasing and selling record, on the basis of which Stillman, Segal, King, and King's corporation, Southern California Meat Co., Inc. could claim and receive subsidy payments without encountering difficulty from the government.

VI

During February and March, 1945, Central Packing Company filed applications with the government for cattle slaughter subsidy payments in the aggregate sum of $143,303.40.

VII

These subsidy claims were signed by defendant as "Owner" and paid by the Reconstruction Finance Corporation, an agency of plaintiff, to Central Packing Company, pursuant to Section 2(e) of the Emergency Price Control Act of 1942, as amended, 50 U.S.C. App. § 902(e).

VIII

In February, 1946, Southern California Meat Co., Inc., King, Stillman, and Segal were indicted in this Court on charges of selling meat at over ceiling prices during February and March, 1945, in violation of the Emergency Price Control Act of 1942, and subsequently on July 5, 1946, all four defendants were found guilty. Defendant Rosenzweig was not among those indicted or convicted.

IX

In 1947, Reconstruction Finance Corporation sent an administrative letter order to Central Packing Company, in care of defendant, relating that Central Packing Company's subsidy claims for the period of August, 1944, through April, 1945, were invalid and that it should make restitution in the sum of $196,962.62 plus interest. Defendant formally protested the letter order in 1948.

X

In 1958 the government filed Civil Action No. 423-58-BH in this Court against King, Stillman, Segal, and defendant for recovery of the subsidy payments in question. Default judgments were entered in said action against Stillman and Segal, the action against King and Southern California Meat Co., Inc., being dismissed. Said action against defendant Rosenzweig was also dismissed on the ground that administrative proceedings were still prnding, the government's suit thus being premature.

XI

Administrative proceedings were thereafter completed. General Services Administration, the successor agency to Reconstruction Finance Corporation, sent a

letter dated August 4, 1960, to defendant. informing him that certain of Central Packing Company's subsidy claims were being reinstated, but that the claims for February and March, 1945, remained invalid, resulting in an indebtedness of Central Packing Company in the amount of $143,303.40 plus interest at four per cent from the date the subsidy payments were made, amounting to $87,845.23 as of July 30, 1960, interest accruing on and after that date at the daily rate of $15.66.

XII

Defendant thereafter protested the letter order of August 4, 1960; and his protest was denied, the case then coming to the Emergency Court of Appeals for review pursuant to Section 204(d) of the Emergency Price Control Act of 1942, 50 U.S.C. App. § 904(d).

XIII

The Emergency Court of Appeals affirmed the August 4, 1960 letter order on the basis of which it declared the February and March, 1945, subsidies invalid, *Rosenzweig v. General Services Administration*, (Dec. 6, 1961), 299 F. 2d 22, cert. den. 369 U.S. 818 (1962); and the Emergency Court made the following findings of fact and rulings:

1. that the administrative agency had authority to declare subsidy claims invalid for willful violations of OPA price regulations;

2. that this determination could be made only if the subsidy applicant had been convicted in a criminal proceeding involving subsidy payments for the periods in question;

3. That the administrative determination that the subsidy applicant had been convicted in criminal

proceedings involving subsidy payments for the periods in question was correct, inasmuch as Stillman, Segal, and King, the individual partners of the applicant, Central Packing Company, had been so convicted and that this was to be considered a conviction of the partnership, Central Packing Company;

4. That the subsidy applicant, Central Packing Company was therefore in willful violation of OPA regulations, resulting in the invalidity of its subsidy claims for February and March, 1945; and

5. That as a consequence the government was entitled to restitution of said subsidy payments, in the amount of $143,303.40 plus interest, from the partnership, Central Packing Company.

XIV

Defendant Aaron Rosenzweig not only participated in financing the venture, signed all of the five claims for subsidy payments submitted to the Reconstruction Finance Corporation during the period of the partnership, to wit, approximately January 1 to March 31, 1945; and he bought cattle for the company; and to insure protection of his investment of approximately $25,000, he co-signed all of the checks issued by the partnership; and said partnership consisted of Messrs. Stillman, Segal and Rosenzweig.

XV

Defendant Aaron Rosenzweig in furtherance of the partnership business, corresponded with the Defense Supplies Corporation by letter of March 9, 1945 and furthermore, filed a "Petition for Release From Hardship" to the Office of Price Administration on November 22, 1946.

XVI

Defendant Aaron Rosenzweig signed an affidavit dated August 20, 1945, and on page 3 of said affidavit, defendant stated:

> "In connection with the partnership arrangement I invested $25,000 and Segal and Stillman each invested approximately the same amount. We were each to receive one-third of the net profits. I did not receive any salary from Central Packing Company or from this partnership arrangement, merely receiving on drawing account $100 a week, which was charged to my personal account. * * *
>
> "The chief reason for my being brought into the partnership with Segal and Stillman was, to my knowledge, the fact that I possessed a license to slaughter."

XVII

The obtaining of subsidies by Aaron Rosenzweig was in the furtherance of the partnership business.

XVIII

After consideration of all the evidence, the Court does not conclude that the defendant knew nothing of the black market sales of meat by the partnership, and further, the evidence does not conclude that defendant Aaron Rosenzweig had no control over the partnership business and furthermore, does not conclude that Aaron Rosenzweig was merely an employee.

XIX

The defendant Aaron Rosenzweig during the months of February and March 1945, was a partner in the partnership Central Packing Company.

XX

The criminal acts of Stillman and Segal, as found by the Court in Criminal Case No. 18366, United States District Court, Southern District of California, wherein Southern California Meat Company, Inc., King, Stillman and Segal were defendants, were committed in the ordinary course of business of Central Packing Company.

CONCLUSIONS OF LAW

I

This Court has jurisdiction in this matter.

II

There was not a formal partnership agreement but even though the relationship be deemed a joint venture, the result would be the same.

III

Aaron Rosenzweig, a partner in the Central Packing Company, is civilly liable for the criminal acts of his co-partners Stillman and Segal in connection with the obtaining of money under the aforementioned invalid subsidy claims.

Dated: January 30, 1964.

/s/ E. Avery Crary,
United States District Judge

Judgment.

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, v. Aaron Rosenzweig, doing business as Central Packing Company, Defendant. Civil No. 62-1337-EAC.

The issues in the above-entitled action having been brought on for trial before Honorable E. Avery Crary, the defendant Aaron Rosenzweig having appeared by his attorneys, Joseph Henry Wolf and Paul Wyler, and the plaintiff by Francis C. Whelan, United States Attorney, Donald A. Fareed, Assistant U.S. Attorney, Chief, Civil Section and Stanley M. Lintz, Assistant U.S. Attorney, and the issues having been duly tried on Tuesday, January 14, 1964, and the Court having filed its Memorandum Opinion for use in preparing Findings of Fact, Conclusions of Law and Judgment on January 21, 1964, directing counsel for the plaintiff to prepare, serve and lodge a Judgment in accordance with Local Rule 7, as amended, it is hereby

Ordered, Adjudged and Decreed that:

Plaintiff, United States of America, shall recover from defendant Aaron Rosenzweig the total sum of $251,030.79; said sum includes $143,303.40 — subsidy payments for February and March, 1945 — plus interest at the rate of four per cent (4%), or $15.66 per day, amounting to $107,827.39.

It Is Further Ordered, Adjudged and Decreed that

Plaintiff, United States of America recover from defendant, Aaron Rosenzweig, interest on said judgment at the rate of seven per cent (7%), as provided by law, and costs in the amount of $61.56.

Dated January 30, 1964

/s/ E. Avery Crary,
United States District Judge

Per Curiam Judgment.

United States Court of Appeals, for the Ninth Circuit.

Aaron Rosenzweig, also known as Aaron Rosensweig, doing business as Central Packing Company, Appellant, vs. United States of America, Appellee. No. 19,289.

[November 4, 1964]

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Ely, Circuit Judges; and Pence, District Judge.

This cause came on to be heard on the record on appeal from the United States District Court for the Southern District of California, Central Division, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Opinion of the United States Emergency Court of Appeals.

United States Emergency Court of Appeals
No. 676

Aaron Rosenzweig, Complainant v. General Services Administration of the United States of America, Bernard L. Boutin, Administrator, Respondent.

Heard at Los Angeles, California, May 5, 1961.

Before Maris, Chief Judge, and Magruder and McAllister, Judges.

Mr. Paul Wyler, with whom Mr. Joseph Henry Wolf was on the brief, for the Complainant.

Mr. Maurice S. Meyer, Attorney, Department of Justice, with whom Messrs. William H. Orrick, Jr., Assistant Attorney General and Frederick N. Curley, Attorney, Department of Justice, were on the brief, for the Respondent.

Filed December 6, 1961.

By Maris, Chief Judge.

The complainant: Aaron Rosenzweig, seeks a judgment setting aside and enjoining the enforcement of an order issued by the respondent, the Administrator of General Services. The order declared invalid the claim for meat subsidy filed by Central Packing Company for the months of February and March, 1945 and demanded restitution by the complainant of the amounts paid on the claims. The pertinent facts are undisputed and are as follows:

During 1944 Charles M. King, Hyman Stillman and Lou Segal entered into a partnership arrangement known as Southern California Meat Company No. 2. Allied in

this enterprise was Southern California Meat Co., Inc., a corporation principally owned by King. Southern California Meat Co., Inc. was to slaughter cattle and Southern California Meat Company No. 2 was to sell the meat. It appears that Southern California Meat Company No. 2 charged overceiling prices on the seal of meat and due to difficulties in obtaining subsidy payments the use of Southern California Meat Company No. 2 was abandoned.

In place of the previous partnership arrangement, Southern California Meat Co., Inc., King, Stillman and Segal late in 1944 entered into a similar arrangement under the name of Central Packing Company.[1] The name Central Packing Company, was that of an existing business owned by the complainant, which had a slaughtering license. The Central Packing Company had a clean meat purchasing and selling record on the basis of which Stillman, Segal King and King's corporation, Southern California Meat Co., Inc., could claim and receive subsidy payments. During February and March, 1945, Central Packing Company filed applications with Defense Supplies Corporation,[2] pursuant to Revised Regulation No. 3,[3] for cattle slaughter subsidy payments in the aggregate sum of $143,303.40. These subsidy

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[1]It is not clear from the record whether the four above named or only Stillman and Segal were partners in this business. The facts as set out above are those alleged by the complainant and which are adopted by the respondent. For purposes of this review they are assumed to be correct.

[2]Prior to this period and until July 1, 1945 Defense Supplies Corporation acted as the paying or disbursing agent in respect to livestock slaughter subsidies. Sec. 5d of the Reconstruction Finance Corporation Act, as amended, 15 U.S.C.A. §606b, 6 F.R. 2972.

[3]10 F.R. 4241, effective January 19, 1945.

claims, signed by the complainant as "Owner", and paid by Defense Supplies Corporation to Central Packing Company, are the subject of this controversy.

During February 1946, Southern California Meat Co., Inc., King, Stillman and Segal were indicted in the United States District Court for the Southern District of California, Central Division, No. 18,366, for violations of and conspiracy to commit violations of the Emergency Price Control Act of 1942 and the applicable regulations promulgated thereunder. It was charged that these defendants operated under the firm names of Southern California Meat Co., Inc., Southern California Meat Company No. 2, and Central Packing Company, and that they shared in all gains and profits accruing from the illegal activities described in the indictment. Among the overt acts were those chargng the defendarts with the issuance, during February and March, 1945, of certain invoices of Central Packing Company showing that meat had been sold at overceiling prices. On July 5, 1946 all four defendants were found guilty and judgments were entered against them. The complainant, while admittedly associated in the business of Central Packing Company, was never indicted or found guilty of any connection with such activities.

On December 23, 1947 a letter-order was sent by Reconstruction Finance Corporation,[4] the agency then in charge of such matters, addressed to Central Packing Company, in care of the complainant, stating that, as

[4]Defense Supplies Corporation was dissolved on July 1, 1945, and its functions transferred to Reconstruction Finance Corporation. Act of June 30, 1945, 59 Stat. 310, 15 U.S.C.A. §611 note. Revised Regulation No. 3, as amended, was then administered by Reconstruction Finance Corporation as the paying agent. 10 F.R. 11155.

the result of an investigation, its subsidy claims were being declared invalid for the periods August 1944 through April 1945. Accordingly, demand was made for reimbursement of the sum of $196,962.62, plus interest. Under dates of January 7 and 9, 1948, the complainant requested information with respect to the basis on which these claims were declared invalid. The parties treated the letter of January 9, 1948 as a formal protest against the letter-order of December 23, 1947. Under date of January 16, 1948, the complainant was advised that the case had been referred to the U.S. Department of Justice and was being handled by the Legal Division of Reconstruction Finance Corporation.

No further action was taken until May 1958 when the United States filed a civil action, No. 423-58-BH, in the United States District Court for the Southern District of California, Central Division, against King, Stillman, Segal and the complainant doing business as Central Packing Company, and Southern California Meat Co., Inc., for the recovery of the subsidy payments in question. Default judgments were entered against defendants Stillman and Segal. The action against King and Southern California Meat Co., Inc., was dismissed. The action against the complainant was dismissed without prejudice on the ground that a protest against the letter-order of December 23, 1947 was still pending. Under date of June 27, 1960 the complainant wrote General Services Administration, the Administrator of which was the successor to Reconstruction Finance Corporation,[5] seeking a determination of the pending protest and

[5]Reconstruction Finance Corporation was abolished and its functions with respect to the meat subsidy program were transferred to the respondent, the Administrater of General Services, effective June 30, 1957. Reorganization Plan No. 1 of 1957, 71 Stat. 647, 22 F.R. 4633, 15 U.S.C.A. §601 note.

attacking the validity of the order on the ground that the complainant had not violated any applicable statutes or regulations.

Under date of August 4, 1960 the respondent informed the complainant that the claims of Central Packing Company for the period from August 1944 through January 1945 in the amount of $53,659.22 were being reinstated but that the February and March 1945 claims remained invalid because of the wilful violations of the Office of Price Administration regulations by Central Packing Company during those two months, which violations were confirmed by the criminal judgments entered against Segal and Stillman. The letter further stated that inasmuch as the Government had not been successful in its efforts to obtain restitution from Segal and Stillman of the meat subsidy payments made to Central Packing Company, and, since the complainant was a partner in Central Packing Company, demand was being made on complainant for restitution of the sum of $143,303.40, plus interest. This letter was treated by the respondent as a new order invalidating the claims and seeking recapture of the money paid to Central Packing Company, which superseded the letter order of December 23, 1947. On August 15, 1960 the complainant protested the letter-order of August 4, 1960 pointing out that neither he nor Central Packing Company had been indicted or convicted in the criminal proceeding referred to and that there never was any determination, judicial or administrative, that Central Packing Company or the complainant himself was in wilful violation of the regulations. Correspondence subsequently passed between the complainant and the respondent in which each expressed his views in respect to the

liability of Central Packing Company and the complainant for restitution of the subsidy payments in question. The complainant's protest was denied on December 7, 1960 and the validity of the letter-order of August 4, 1960 is here for review.

The interrelationship between the meat subsidy program and the price control program has frequently been discussed by this court and need not be recounted here. See Wm. Schulderberg — T. J. Kurdle Co. v. Reconstruction Finance Corp., 1948, 169 F. 2d 419, cert. den. 335 U.S. 846; Earl C. Gibbs, Inc. v. Reconstruction Finance Corp., 1948, 169 F. 2d 654; Merchants Packing Co. v. Reconstruction Finance Corp., 1949, 176 F. 2d 908; Evergreen Meat Co. v. Reconstruction Finance Corp., 1951, 188 F. 2d 368; Riverview Packing Co. v. Reconstruction Finance Corp., 1953, 207 F. 2d 415. It is sufficient to recall that the purpose of the subsidy program was to give relief to the meat slaughtering industry from a roll-back in the maximum prices of meat. Earl C. Gibbs, Inc. v. Defense Supplies Corporation, Em. App. 1946, 155 F. 2d 525, 526, cert. den. 329 U.S. 737. In carrying out the purposes of the subsidy program, directives were given by the Economic Stabilization Director[6] to the Office of Price Administration in respect to maximum prices of meat, and to Defense Supplies Corporation, and after June 30, 1945, to its successor, Reconstruction Finance Corporation,[7] in respect

[6]During the period here involved the Economic Stabilization Director, who had been given the overriding authority over the entire subsidy program by Executive Order 9250, 1 F.R. 7871, issued Directive 28, effective January 29, 1945, 10 F.R. 522, and Directive 38 on March 21, 1945, which were superseded by Directive 41, effective April 24, 1945, 10 F.R. 4494.

[7]Amendment 2 to Directive 41, effective January 28, 1946, 11 F.R. 1215.

to meat subsidy payments. Revised Regulation No. 3 of Defense Supplies Corporation, which governed the subsidy claims filed by Central Packing Company for February and March 1945, provided that claims should be paid on a purely preliminary basis but that Defense Supplies Corporation and later its successor, Reconstruction Finance Corporation,[8] should have the right to require restitution of such payments upon a finding that the claims were invalid or defective.[9]

The express authority to declare subsidy claims invalid for wilful violations of OPA regulations was contained in Section 7003.10(a) of Revised Regulation No. 3 and amendments thereto.[10] That section required a determination by the Price Administrator and the others to whom the duty was subsequently delegated[11] that the subsidy applicant had wilfully violated an applicable regulation, or a certification by that officer that the subsidy applicant had been determined in a civil

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[8]Amendment 6 to Revised Regulation No. 3, effective July 1, 1945, 10 F.R. 11155.

[9]Subsections 7003.9(b) and (d) of Revised Regulation No. 3, 10 F.R. 4243.

[10]10 F.R. 4243; 10 F.R. 8073; 10 F.R. 11153-11154.

[11]The authority to make such determinations ultimately was vested in the respondent, the Administrator of General Services, under the following sequence of events: The functions of the Price Administrator and the Economic Stabilization Director were transferred to the Temporary Controls Administrator by Executive Order 9809, issued December 12, 1946, 11 F.R. 14281, 50 U.S.C.A. Appendix § 601 note. Then the functions of the Temporary Controls Administrator with respect to subsidies were transferred to Reconstruction Finance Corporation when it became successor by Executive Order 9841, effective May 4, 1947, 12 F.R. 2645, 50 U.S.C.A. Appendix § 601 note. Finally, these functions were transferred to the respondent by Reorganization Plan No. 1 of 1957, 71 Stat. 647, 22 F.R. 4633, 15 U.S.C.A. § 601 note. Thus were coalesced in the Reconstruction Finance Corporation, and finally in the respondent, the responsibilities of both certification and payment.

proceeding to have violated a substantive provision of an applicable regulation. Since there is no suggestion that the latter occurred in this case, we are concerned here only with the question of the validity of the determination by the respondent in the letter-order of August 4, 1960, that the Central Packing Company had wilfully violated applicable regulations. Section 7(b)(1) of Directive 41 sets out the factors upon the presence of which the officer is to base his determination of a wilful violation. Section 7003.10(a) of Revised Regulation No. 3 must be construed in conformity with Section 7(b)(1) of the directive,[12] which provides in this connection that a recommendation by the Price Administrator (or, later, the officer who succeeded him) for the permanent withholding or recapture of subsidy payments because of wilful violation of the regulations may only be made after the conviction of the subsidy applicant in a criminal proceeding involving subsidy payments for the periods in question.[13]

The complainant attacks the validity of the letter-order of August 4, 1960 on the ground that the respondent had no authority to make a determination that Central Packing Company had wilfully violated the price regulations. This argument is without merit. We have already set out the history of the coalescing in the Reconstruction Finance Corporation, and later in the respondent, of the responsibilities for both certification of price violations and recapture of subsidy payments.[14]

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[12]San Antonio Packing Co. v. Reconstruction Finance Corp., Em. App. 1950, 182 F. 2d 614, 618.

[13]Amendments 11 to Directive 41, issued by the Temporary Controls Administrator effective April 8, 1947, 12 F.R. 2408.

[14]See footnotes 2, 4, 5, 6 and 11.

As can be seen from the regulation and the directive, the respondent had the authority to make a determination of wilful violation and to order restitution of the subsidy payments from Central Packing Company for the periods involved in the convictions if the respondent was correct in finding that the criminal proceedings had terminated in the conviction of the subsidy applicant.

It is the complainant's contention that the criminal proceedings, in which Southern California Meat Co., Inc., King, Stillman and Segal were convicted, did not terminate in the conviction of the subsidy applicant since Central Packing Company was neither indicted nor convicted as a separate entity in those proceedings. In support of this proposition the complainant relies upon United States v. A & P Trucking Co., 1958, 358 U.S. 121, in which the Supreme Court held that a partnership, as an entity, may be proceeded against under certain Federal statutes quite apart from the participation and knowledge of the partners as individuals. In arriving at this conclusion, the Court considered the pertinent statutes in the light of the purposes of the law involved in that case. However, the rule of the A & P Trucking Co. case is inapplicable here. That rule does not support the proposition that in 1946 the Government was required in the criminal proceedings for wilful violation of OPA regulations to proceed against Central Packing Company, as an entity, for the crimes allegedly knowingly committed and participated in by the partners named in the indictment. Whether the Government could have done so

we do not decide. It is true that under the regulation a partnership was included in the definition of person.[15] But this was merely a shorthand method of making clear that partnerships, as such, could file and receive payment of subsidy claims under the regulation. There was no provision in the Emergency Price Control Act which required a criminal proceeding for wilful violations of OPA regulations to be brought against a subsidy-claimant partnership, as a separate entity, if the partners comprising the partnership had violated the Act in connection with the partnership business.

The respondent contends that the conviction of the individual partners must be considered a conviction of the partnership, the subsidy applicant Central Packing Company, for the purposes of Section 7(b)(1) of Directive 41. We agree with this contention. The complainant himself cites Jung v. Bowles, 9 Cir. 1946, 152 F. 2d 726, which supports this view. In that case, which involved a civil action for violations of the OPA regulation, the defendants, who were copartners, contended that liability rested on the partnership. The court, however, rejected their claim on the ground that under the law of California a partnership is not an entity distinct from its members.

The construction given Section 7(b)(1) of Directive 41 by the respondent carries out the spirit and intent

[15] "§ 7003.1 *Definitions*. When used in the regulations in this part, the following terms shall have the following meanings:

(a) 'Person' means an individual, corporation, partnership, association, institution, or other business entity, or legal successor or representative of any of the foregoing." 10 F.R. 4241.

of the subsidy program. For payment of subsidy was conditioned upon compliance by the slaughter with the maximum prices applicable to his sales of meat. In Armour & Co. v. Reconstruction Finance Corporation, 1947, 162 F. 2d 918, 922, this court had occasion to point out that the purpose of Section 7003.10(a) was not to penalize violators but to prevent the diversion of subsidy funds from the accomplishment of the object for which they were intended. The object was to implement the price control program by supplementing the ceiling prices to be received by slaughterers for their meat to the extent necessary to make these prices generally fair and equitable. It was obviously not in accord with that purpose to pay a slaughterer any subsidy for a period in which it had been judicially determined that he had obtained from his sales of meat amounts in excess of the ceiling prices fixed under the price control program. So to provide was not to impose a penalty but merely to deprive the slaughterer of subsidy funds to which he was not entitled.

We hold that the respondent's determination that Central Packing Company was in wilful violation of the OPA regulations is amply supported by the results of the criminal proceeding in which individual partners of the partnership, Central Packing Company, were convicted of such wilful violations and that the respondent did not err in his letter-order of August 4, 1960 in making such a determination and thereupon holding invalid the subsidy claims of Central Packing Company for February and March 1945.

The complainant earnestly urges that he should not be held personally liable for restitution of subsidy payments which the respondent contends are due and owing from Central Packing Company. The letter-order of Au-

gust 4, 1960 invalidating the subsidy claims, however, does not purport to determine the complainant's liability for such restitution and the respondent concedes that he could not issue an order imposing liability for repayment upon the complainant personally. All that the letter-order of August 4, 1960 does in this connection is to assert as a matter of law that the complainant as a partner in Central Packing Company is liable for its debts, and to demand payment from him on this theory and threaten legal action if he fails to make such payment.

The complainant contends, however, that he is wholly innocent of the illegal activities of the other partners of Central Packing Company, that he did not receive any part of the subsidies in question, that as to these transactions he was not a partner, and that the respondent is seeking to hold him liable for the criminal acts of others. It may well be that these contentions of the complainant are well founded. We intimate no opinion upon their merits, however, since this court is without power to adjudicate these questions. Our jurisdiction is derived solely from the Emergency Price Control Act which authorizes us to consider the validity of regulations and orders issues under section 2 of the Act.[16] The letter-order of August 4, 1960 was such an order and, therefore, within our jurisdiction to the extent that it determined the validity of the subsidy claims of Central Packing Company, the amounts paid to it on invalid claims, and ordered restitution to be made by Central Packing Company as subsidy applicant. But when in that letter the respondent discussed the liability of the complainant to pay the Central Packing Company's restitution-debt to the Gov-

[16]Section 204(d) of the Emergency Price Control Act of 1942, 56 Stat. 32, 50 U.S.C.A. Appendix § 924(d).

ernment, he entered a field in which he was not authorized by Section 2 of the Act to make an order which would be reviewable in this court and nowhere else. That part of the letter, consisting of its last three paragraphs, is, therefore, in no sense an order under Section 2 of the Act which was protestable by the complainant and reviewable by this court. The fact that the complainant did protest the entire letter of August 4, 1960 is immaterial since the protest was wholly ineffective to give this court jurisdiction to review the last three paragraphs to which we have referred. It necessarily follows that the liability of the complainant to pay the Central Packing Company's debt to the Government may be determined in an action for restitution hereafter brought by the Government against the complainant in any court having jurisdiction of the action. In such an action the complainant will have full opportunity to assert, and establish if he can, any defenses to the Government's claim against him to which he may believe himself entitled, except the validity of respondent's determination that Central Packing Company's subsidy claims for February and March 1945 are invalid[17] and that the Government is entitled to restitution for the sums paid to Central Packing Company on those claims. Since the facts admitted in this case indicate that with respect to the transactions out of which those claims arose Central Packing Company was a partnership, it is clear that the Government is entitled to restitution from those persons who were partners with respect to those transactions if, as appears to be the case, the partnership assets were insufficient for that purpose. As we have stated, however, we are not authorized to, and do

[17]Yakus v. United States, 1944, 321 U.S. 414, 427-431.

not, decide whether the complainant is one of those persons.

The complainant also raises the question of the application of the doctrine of laches on this review. It is true that this case involves ancient history. The original letter-order of invalidation dates back to December 23, 1947 and it was protested on January 16, 1948. The civil action for restitution was not brought until ten years later. The complainant says that this delay has prejudiced him in that records are lost and important witnesses have become unavailable. Again the complainant raises an issue which goes to the defense of his case.[18] Whether or not such a defense is appropriate under the circumstances is a matter upon which we do not pass and which can be raised hereafter in a restitution suit, if one is brought against the complainant. We observe, however, that the doctrine of laches is unavailable in respect to delay in the protest procedure in view of the fact that Section 203(d) of the Emergency Price Control Act of 1942, as amended,[19] provided for a judicial remedy in this court in case of unreasonable delay in administrative action upon a protest.

Since we find no error in those portions of the letter-order of August 4, 1960 which we have authority to review a judgment will be entered dismissing the complaint.

A true copy. (Seal)

Teste: J. Fredrick Mattingley, Acting Clerk.

J. FREDRICK MATTINGLEY

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[18]See Riverview Packing Co. v. Recontruction Finance Corp., 3 Cir. 1953, 207 F. 2d 361, 366-368.

[19]The Act of June 30, 1944, 58 Stat. 639, added subsection (d) to section 203 of the Emergency Price Control Act of 1942, as amended, 50 U.S.C. § 923(d), 1946 Edition.

JUDGMENT.

United States Emergency Court of Appeals
No. 676.

Aaron Rosenzweig, Complainant v. General Services Administration of the United States of America, Bernard L. Boutin, Administrator, Respondent.

Present: Maris, Chief Judge, and Magruder and McAllister, JJ.

This cause came on to be heard on the complaint, answer and transcript of administrative proceedings, and was argued by counsel.

Upon consideration whereof, It Is Ordered, Adjudged and Decreed that the complaint herein be and it is hereby dismissed.

By the Court: Albert B. Maris, Chief Judge.

December 6, 1961.

(Seal) A true copy. Teste: J. Fredrick Mattingley, Acting Clerk.

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING.

United States Emergency Court of Appeals
No. 676.

Aaron Rosenzweig, Complainant v. United Services Administration of the United States of America, Bernard L. Boutin, Administrator, Respondent.

Present: Maris, Ch. J. and Magruder and McAllister, JJ.

Upon consideration of the complainant's petition for rehearing It Is Ordered that the opinion filed in the above entitled case on December 6, 1961, is amended

by striking out in lines 17 and 18 on page 12 of the printed opinion the words "it is clear" and inserting in lieu thereof the words "the court in which the restitution suit is brought may conclude after considering the applicable law."

It is further Ordered that the petition for rehearing is denied.

By the Court, Albert B. Maris, Chief Judge.

January 2, 1962.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 986

AARON ROSENZWEIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In January, 1945, petitioner began a livestock slaughtering business with two associates, under the name of Central Packing Company (Tr. 34). The arrangement was that each man would invest $25,000 in the business, draw a weekly salary, and share equally any remaining profit or loss (Tr. 38, 58, 63). Petitioner was required to co-sign all checks and approve all bills (Tr. 39, 61–62, 68). Petitioner signed, as "owner" of the Company, applications for subsidies under the Emergency Price Control Act of 1942.[1] The applications certified that the applicant

[1] Under this Act, subsidies were paid to livestock slaughterers to give relief from a roll-back in the ceiling prices of meat and

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had not violated price ceiling regulations covering sale of beef (Tr. 17–19). After subsidies were paid, it was discovered that the company had unlawfully sold beef in excess of ceiling prices during the period covered by the applications. Petitioner's two associates were subsequently indicted and convicted for this violation of the Emergency Price Control Act. Petitioner was not indicted, and there has been no showing that he knew about the illegal sales.

It was determined administratively that, because of the violations of the Act, the subsidy applications were invalid, and this determination was upheld by the Emergency Court of Appeals. *Rosenzweig* v. *General Services Administration,* 299 F. 2d 22, certiorari denied, 369 U.S. 818. Accordingly, Central Packing Company was concededly liable to make restitution of the subsidy payments it received. However, the Emergency Court of Appeals held that it did not have jurisdiction to determine petitioner's individual liability for this debt.

This action for restitution was then brought. After trial, the district court held petitioner liable, finding that he was either a partner or a co-venturer of his two associates. The court ruled that a partner is not absolved from liability for partnership debts because the debt arose from criminal activity on the part of other partners (Pet. App. 15), and the court

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to encourage necessary production. 50 U.S.C. App. (1946 ed.) 902(e); 10 Fed. Reg. 4241 (April 20, 1945) (effective January 19, 1945). See *Rosenzweig* v. *General Services Administration*, 299 F. 2d 22, 25–26 (Em. Ct. of App.), certiorari denied, 369 U.S. 818.

of appeals affirmed without opinion. *Rosenzweig* v. *United States*, 337 F. 2d 856.

It is clear that invalid subsidy payments were made to Central Packing Company and that petitioner and his associates had the benefit of these payments, which were either distributed to them or were used to pay business debts for which they would have been individually liable (Tr. 65–66). Both California (where the company was located) and other jurisdictions hold individual partners or joint venturers liable for return of benefits unlawfully received by the partnership or venture, irrespective of whether they participated in the wrongdoing.[2] *Gibbon* v. *Henley*, 131 Cal. 6, 63 Pac. 61 (1900); *First National Bank of Altoona* v. *Turchetta*, 407 Pa. 511, 181 A. 2d 285 (1962); *Herweck's Paint & Wallpaper Co.* v. *C.I.T. Corporation*, 123 F. 2d 989 (C.A. 5). The cases cited by petitioner (Pet. 13–14) are not to the contrary, since none of them involved the restitution of benefits paid to the partnership.[3] In *Prairie Oil &*

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[2] Since the right to restitution here asserted by the United States rests on federal statute and regulation, it would appear that the question of petitioner's individual liability is a matter of federal law. Cf. *Clearfield Trust Co.* v. *United States*, 318 U.S. 363. There is no reason, however, why the federal rule should be different from the California law.

[3] In *Graham* v. *Meyer*, Fed. Cas. No. 5673 (C.C.S.D.N.Y.), the court refused to hold a partner liable for the statutory penalty of forfeiting collateral held by the partnership for a usurious loan negotiated by his co-partner. However, the court indicated that a suit in equity against both partners for return of the collateral would lie. In *First Nat. Bank* v. *Connolly* (erroneously cited at page 13 of the petition as *Hutchins* v. *Turner*), 172 Ore. 434, 138 P. 2d 613 (1943), the court could find that only a small part of the funds converted by defendant's partner was used by the partnership.

Gas Co. v. *Shanblum,* 294 Fed. 894 (C.A. 5), certiorari denied, 265 U.S. 580, defendant's associates were acting for their own benefit, and neither defendant nor the partnership derived any benefit from their conduct. *Gordon* v. *United States,* 347 U.S. 909, and *United States* v. *A & P Trucking Co.,* 358 U.S. 121, 126–127, are also inapposite since they involved the question of imposing criminal liability on a partner on the basis of knowledge or acts of his co-partners or employees.

No conflict of decisions is presented and the disposition of the lower courts is clearly correct. There is no occasion for further review by this Court.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

APRIL 1965.

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